BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES A. GINAVAN Claimant	)	
VS.	)	
U.S.D. #320 Respondent	)	Docket No. 1,010,062
AND	)	
UTICA NATIONAL INS. CO. OF TEXAS Insurance Carrier	)	

ORDER

Claimant requested review of the November 18, 2005 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on February 14, 2006.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for the claimant. Jeffrey S. Austin of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the depositions of Glenn M. Amundson, M.D., taken November 16, 2005, and Jeffrey T. MacMillan, M.D. taken November 9, 2005, are part of the evidentiary record as both depositions were taken within respondent's terminal date. The parties further agreed the Board should review the entire evidentiary record and determine this matter without remand to the Administrative Law Judge (ALJ).

ISSUES

The ALJ's Award listed the evidentiary record as the transcript of regular hearing held October 6, 2005, and the deposition of Daniel D. Zimmerman, M.D., taken September 20, 2005. As previously noted, Drs. Amundson and MacMillan's depositions

were taken within the established terminal dates and should have been included as part of the evidentiary record. The ALJ specifically noted in his Award that "Dr. Zimmerman is the only physician who testified in this matter." Although Dr. Zimmerman opined claimant suffered a 19 percent functional impairment, the ALJ discounted that opinion because the doctor used the range of motion model rather than the DRE model of the AMA *Guides*[1]. The ALJ then quoted from sections of the AMA *Guides* and found the claimant sustained a 10 percent functional impairment.

The claimant requests review of the nature and extent of disability. Claimant argues the ALJ erred in substituting his personal interpretation of the AMA *Guides* instead of adopting the rating provided by Dr. Zimmerman. This argument is premised upon the ALJ's statement that Dr. Zimmerman was the only physician to testify. If that was the only medical evidence the ALJ considered, then claimant further argues the ALJ went outside the record and substituted his opinion for the physician's in order to arrive at his conclusion the DRE model would have resulted in a 10 percent impairment. Claimant argues he is entitled to a 19 percent functional impairment based upon Dr. Zimmerman's rating.

In the alternative, the claimant notes that Dr. Amundson's rating was provided before claimant suffered recurrent disk herniations. Because that recurrence was a natural and probable consequence of the original injury, claimant further argues that Dr. Zimmerman's rating is more persuasive because it was provided after claimant suffered the recurrent disk herniations.

Conversely, respondent notes Drs. Amundson and Zimmerman's depositions were taken within established terminal dates and the failure to list them as part of the record was most likely a clerical error. Because Dr. Amundson opined claimant suffered a 10 percent functional impairment based upon the DRE model of the AMA *Guides*, the respondent concludes the ALJ must have reviewed and adopted Dr. Amundson's testimony.[2]

In the alternative, respondent argues that Dr. Amundson properly used the preferred DRE model of the AMA *Guides* to determine claimant's 10 percent functional rating. And that rating was provided after claimant reached maximum medical improvement but before claimant suffered recurrent disk herniations. Respondent further argues claimant's recurrent disk herniations are the result of an intervening accident and it should only be responsible for claimant's functional impairment before that new accident. As only Dr.

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[2] The ALJ's Award was entered before Drs. Amundson and MacMillan's deposition transcripts were received by the Division of Workers Compensation. Consequently, the ALJ could not have reviewed them before issuing his award.

Amundson provided a rating before the claimant's recurrent disk herniations, respondent requests the Board to adopt his opinion. Consequently, the respondent requests the Board to affirm the ALJ's finding claimant suffered a 10 percent whole person functional impairment.

Because claimant returned to work for wages equal to or more than his average gross weekly wage at the time of his injury, the sole issue for Board determination is the nature and extent of claimant's functional impairment.[3]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant began working as an art instructor for the school district in 1997. One of claimant's job duties was to mix powdered clay into a wet clay each day for ceramic classes. On May 16, 2001, the claimant was lifting a 50-pound bag of powdered clay to dump into a barrel when he felt a pop in his lower back. The next morning the claimant began experiencing a lot of pain. Claimant advised his employer and sought medical treatment with his family physician, Dr. Keith Wright, in Manhattan, Kansas. On May 31, 2001, claimant was diagnosed with low back pain and radiculopathy into the right leg. An MRI was performed on June 6, 2001, which revealed a moderately large herniation of the L4-5 disk, spinal stenosis at L4-5 as well as dehydration of the L5-S1 disk space. Dr. Wright referred the claimant to Dr. Jones, an orthopedist.

On July 17, 2001, a CAT scan was performed which confirmed the MRI findings. Claimant was then referred to Dr. Glenn M. Amundson, a board certified orthopedic surgeon. Dr. Amundson reviewed the MRI results and recommended surgery to repair two ruptured disks at L4-5 and L5-S1.

On August 27, 2001, Dr. Amundson performed a right L5-S1 laminotomy and diskectomy as well as a left L4-5 laminotomy and diskectomy on claimant at Menorah Medical Center. On September 5, 2001, the claimant indicated his leg pain had resolved due to the L4-5 and L5-S1 surgeries. On October 3, 2001, the claimant reported that he was pain free and he had no numbness, tingling, weakness or incoordination. The claimant underwent physical therapy from September 25, 2001 through October 25, 2001.

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[3] See K.S.A. 44-510e(a).

In a letter dated February 4, 2003, Dr. Amundson rated the claimant, based on the AMA *Guides*, DRE Category III, as having a 10 percent whole person functional impairment. The doctor placed restrictions of lifting 50 pounds occasionally, avoid any sustained or awkward postures of the lumbar spine and no repetitive bending, pushing, pulling, twisting or lifting activities on a permanent basis. The doctor further noted that the rating was based upon claimant's last evaluation on November 2, 2001, at which time the doctor felt claimant was at maximum medical improvement.

Claimant noted that his back felt much better after the surgery. He continued to work with restrictions for the school district until December 2001. Claimant then began working for Clay Cellar, a ceramic shop, as a production manager. His new employer modified the workplace due to claimant's restrictions. The claimant's job duties were making slab form platters and bowls. He would fire those pieces in a kiln. The average weight of those pieces was eight pounds maximum. The claimant testified he had the opportunity to sit, stand, lay down or anything to feel comfortable. He further testified that his job duties were all within Dr. Amundson's restrictions. The claimant changed jobs in September 2003, and went to work for Columbian Theater Foundation. The claimant is the executive director, a managerial position.

Claimant began to gradually experience the onset of problems with his back, hips and legs. The claimant noted the onset of pain was slow and gradual but that it was the same type of pain that he had felt before surgery. And the claimant testified that he had not suffered any additional accidental injuries or aggravations to his back while working at the Clay Cellar or Columbian Theater Foundation.

On August 6, 2003, the claimant returned to see Dr. Amundson due to bilateral buttock pain. On December 5, 2003, the claimant had another MRI performed which revealed herniated disks at L4-5 and L5-S1. Dr. Amundson concluded claimant had ruptured the same disks again and he recommended disk replacement surgery. The doctor noted the recurrence was in part related to the original injury, resultant surgery and weakening of the disks. He testified:

> Q. In your opinion would the recurrence be a result of the fact that the disc was injured in the first place or is it just totally unrelated to the fact that the disc was injured in the first place?
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> A. I think it frankly can be related to the conditions of injury. I think once a person has had failure of a disc from an injury that's required surgery, I think it's weakened. There is a literature documented recurrence rate. Now in somebody that never describes a mechanism of injury or a new injury, I think it's more strongly related to the fact that it was weakened originally. In somebody that's had a previous injury that gets in a motor vehicle accident that blows out a disc, I think it was still frankly weakened by the original injury but the motor vehicle accident was the clear inciting

> force for the new one and they are both responsible. But I think as long as someone has had injury to the disc, there is an associated recurrence rate, that it is weaker, and that is at least in some part responsible for any new reherniation.[4]

At the respondent's attorney's request, claimant was examined and evaluated by Dr. Jeffrey T. MacMillan, board certified orthopedic surgeon, on February 19, 2004. The doctor recommended lumbar epidural steroid injections or repeat laminotomy and diskectomy at L4-5. Dr. MacMillan would limit the claimant to sedentary physical demand as defined by the U.S. Department of Labor *Dictionary of Occupational Titles.* The doctor testified:

> Q. Is there anything significant that you can testify to in terms of chronology about the potential cause for his repeat herniation after, as he testified, he left the school district in fine condition and worked for an employer call [sic] the Clay Cellar for between a year and a half and two years; is there anything that you could find significant from a chronological standpoint?
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> A. Well, in terms of a culpable cause, I don't think there is one. Mr. Ginavan appears to have had just a slow gradual onset of the symptoms as opposed to a sudden onset of symptoms directly corresponding to a specific event or activity. So given that history, the most likely etiology of the herniation is just continued degenerative change within the L4-L5 disc that ultimately resulted in a slow spontaneous disc herniation.[5]

In the February 19, 2004 report, the doctor further opined in part:

> I would have to conclude that Mr. Ginavan's recurrent disk herniation is not causally related to his work injury of April 2001. The most likely 'cause' of the recurrent herniation is continued age related deterioration of the disk itself. But with a year and a half to two years of additional activity following his surgery, there could be far too many intervening events that could be causally related to the recurrent herniation. Consequently, one cannot logically conclude that there is a direct causal relationship between the injury of 2001 and the recurrent herniation.[6]

Initially, the Board must address respondent's contention that claimant's recurrent disk herniations are new and distinct injuries. If so, respondent argues it is only liable for the claimant's functional impairment before the new injuries.

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[4] Amundson Depo. at 14-15.

[5] MacMillan Depo. at 10-11.

[6] *Id.*, Ex. 2 at 3.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[7], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

In this case the evidence established that claimant did not suffer an additional accidental injury or aggravation to his lumbar spine after his surgery. Nevertheless, with the passage of time he suffered recurrent disk herniations. Dr. MacMillan attributed the recurrence to continued degenerative change at the previously injured disks. In *Nance*[8], the Supreme Court noted that an increased disability due to the natural result of aging acting upon a prior injured condition would be compensable as a natural and probable consequence of the primary injury. The Court stated:

> In order for the deterioration of an injury to be compensable, the increase in disability must be shown to be a direct and natural result of the primary injury. See *Jackson*, 208 Kan. at 643. The passage of time in an of itself is not a compensable injury. Thus, where the deterioration would have occurred absent the primary injury, it is not compensable. However, where the passage of time causes deterioration of a compensable injury, the resulting disability is compensable as a direct and natural result of the primary injury.[9]

Dr. Amundson, attributed the recurrent disk herniations to the fact that after the surgery the disks were weakened. The Board finds claimant has met his burden of proof that the recurrent disk herniations are a natural and probable consequence of the work-related injury he suffered to the same disks on May 16, 2001.

There were just two ratings provided in this case. As previously noted, Dr. Amundson rated claimant's functional impairment at 10 percent. But the doctor agreed that his rating was made before claimant had reached maximum medical improvement and before the recurrent disk herniations.[10]

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[7] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[8] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

[9] *Ibid.* at 550.

[10] Amundson Depo. at 18.

Conversely, at his attorney's request, the claimant was examined and evaluated by Dr. Daniel D. Zimmerman on January 26, 2005. Based on the AMA *Guides*, Dr. Zimmerman determined the claimant has a 19 percent impairment rating.

The Board finds Dr. Zimmerman's opinion controlling because it was provided after claimant had reached maximum medical improvement after he suffered recurrent disk herniations. Consequently, the Board modifies the ALJ's Award to find claimant suffers a 19 percent whole person functional impairment.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated November 18, 2005, is modified to reflect claimant is entitled to compensation for a 19 percent whole person functional impairment.

The claimant is entitled to 6 weeks[11] of temporary total disability compensation at the rate of $347.62 per week or $2,085.72 followed by 78.85 weeks of permanent partial disability compensation at the rate of $347.62 per week or $27,409.84 for a 19 percent functional disability, making a total award of $29,495.56 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of March 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

[11] The ALJ's Award incorrectly indicated 5.86 weeks of temporary total disability compensation was to be paid but the parties stipulated such compensation was paid from August 27, 2001 to October 7, 2001, which comprises a 6 week time period.

c: Roger D. Fincher, Attorney for Claimant
Jeffrey S. Austin, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director